84-287

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1984

LEROY STEWART,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,
GARY D. NUSS, and ROCKWELL
INTERNATIONAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page:
Questions Presented for Review.....	1
Parties to the Action.....	1
Tables of Authorities.....	2
Reference to Opinions Below.....	5
Jurisdiction.....	5
Statutory Provisions Involved.....	5
Statement of Facts.....	6
Statement of the Case.....	9
Reasons for Granting of the Writ.....	11
Conclusion.....	25

Appendix:

A. Opinion of United States Court of Appeals for the Tenth Circuit	26
B. Order Denying Petition for Rehearing by United States Court of Appeals for the Tenth Circuit	62
C. Opinion of United States District Court for the District of Colorado	63
D. Statutory Provisions	68

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Respondents.

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review in this Petition:

1. Did the Court of Appeals err in affirming the summary judgment against Petitioner?

2. Did the Court of Appeals err in holding that Respondent United States was covered by workmen's compensation insurance pursuant to 40 U.S.C. 290?

PARTIES TO THE PROCEEDING

The Parties are as set forth in the caption. Respondents were the defendants in the lower court proceedings.

TABLE OF AUTHORITIES

Page:

Statutes:

5 U.S.C. 8101, et.seq..... 20

28 U.S.C. 1346(b)..... 18

28 U.S.C. 2671, et. seq..... 7

28 U.S.C. 2674..... 18

28 U.S.C. 2675(a)..... 9

40 U.S.C. 290..... 8,20,22,24

42 U.S.C. 2061..... 17,19,23

42 U.S.C. 2201(k)..... 19,23

Colo.Rev.Stat.8-41-105..... 19,21

Colo.Rev.Stat.8-41-106..... 21

Colo.Rev.Stat.8-48-101(2)..... 18,22

Colo.Rev.Stat.8-52-102..... 12

Colo.Rev.Stat.42-4-1401, et.seq... 15

Court Rules:

Rule 56, Federal Rules of Civil Procedure..... 11,12,16

TABLE OF AUTHORITIES(con't)

Page:

Cases:

Breeding v. Tennessee Valley Authority, 243 Ala.240, 9 So.2d 6(1942)..... 20

Colorado Civil Air Patrol v. Hagans, 662 P.2d 194(Colo.App. 1983)..... 13

Finn v. Industrial Commission, 165 Colo. 106, 437 P.2d 542(1968)..... 14

Frohlick Crane Service v. Mack, 182 Colo. 39, 510 P.2d 891(1973)..... 23

Kandt v. Evans, 645 P.2d 1300(Colo. 1982)..... 14

Martin K. Eby Construction Company v. Indust.Comm., 151 Colo. 320, 377 P.2d 745(1963)..... 13

Matter of Welham, 653 P.2d 760(Colo. 1982)..... 13

Mineral County v. Industrial Commission, 649 P.2d 728(Colo.App. 1982). 13

Peak v. Small Business Administration, 660 F.2d 375(8th Cir., 1981)..... 18,20

Potomac Elec.Power Co. v. Director, 449 U.S. 268(1980)..... 21

Richardson v. United States, 577 F.2d 133(10th Cir., 1978)..... 18

Rogers v. Industrial Commission, 40 Colo.App.313, 574 P.2d 116(1978)... 13

Roleofs v. United States, 501 F.2d 87(5th Cir., 1974)..... 18

TABLE OF AUTHORITIES(con't)

Page:

Cases:

Silkwood v. Kerr-McGee, __U.S.__, 104 S.Ct. 615(1984).....14,21

Standard Oil Company v. Industrial Commission, 38 Colo.App.39, 522 P.2d 1029(1975)..... 22

Stewart v. United States, 716 F.2d 755 (10th Cir., 1082)..... 5

United States v. Orleans, 425 U.S. 807 (1976)..... 17

Washington Metro Area Transit Auth. v. Johnson, __U.S.__,104 S.Ct.2827(1984) 21

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 716 F.2d 755(1982). A copy is set out in the Appendix, infra at p. 26. The denial of the petition for rehearing is set out in the Appendix, infra at p. 62. The decision of the United States District Court for the District of Colorado is not reported, but is set out in the Appendix, infra at p. 63.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 28, 1982. The petition for rehearing was denied on May 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c).

STATUTORY PROVISIONS INVOLVED

Various provisions of the Colorado Workmen's Compensation Act are involved in this case. These will not be set forth verbatim at this point. Those necessary for resolution of this Petition are set forth either in the body of this Petition or in the Appendix, infra at p. 68.

STATEMENT OF FACTS

Petitioner is a former employee at the Rocky Flats Nuclear Weapons Plant, which is located northwest of Denver, Colorado. He was an employee of Rockwell International and was involved in the manufacturing of nuclear weapons, though his exact job description is classified, and his job duties are unknown to counsel.

On May 20, 1976, Petitioner arrived at the parking lot at that plant at 7:06 a.m. He opened his car door, stepped out, and reached for his lunch pail in the car. Before he could turn around, he was crushed between his own vehicle and a car driven by Respondent Nuss and owned by Respondent United States of America(Vol.VII, p. 22). Petitioner suffered massive injuries. He spent several weeks in the hospital, later lost his right leg in 1979 as a result of the accident, and has not worked a day since the accident. He remains totally disabled at the time of the writing of this Petition.

Petitioner had been employed at the plant since 1958. This plant is owned by Respondent United

States. Respondent Rockwell took over the day-to-day operations of the plant in 1975. At the time of the accident, no investigation was done by law enforcement officials of the State of Colorado or any Federal agency. The report of Respondent Rockwell established that Respondent Nuss had fallen asleep. There has never been any dispute that Petitioner was merely exiting his vehicle at the time of the accident(Vol.VII, p. 22).

After the accident, Petitioner filed a claim under the Federal Tort Claims Act(28 U.S.C. 2671, et. seq.)(hereafter FTCA). No action was ever taken on the claim, and the initial complaint was filed with the United States District Court for the District of Colorado. After a period of time, it became known to Petitioner that the Rocky Flats Plant was operated on a daily basis by Respondent Rockwell. The complaint was then amended to include Respondents Rockwell and Nuss.

The documents of record established that several material factual issues exist. The lower courts dismissed Petitioner's amended complaint on

summary judgment on the basis that he was precluded from pursuing any remedy except workmen's compensation. The record reflects that Petitioner carpooled with two other workers and either drove or rode with them every morning(Vol.VII, p.11). He normally traveled from his home to work on roads in the western suburbs of Denver. He would then enter through the eastern gate at the plant(Vol.VII, p. 12-13). A cursory check of badges was made at that gate. Petitioner would then park his vehicle, as occurred on the date of the accident.

The parking lot outside of Building 750 is where the accident took place. Petitioner had no assigned parking place nor was he ever given an authorization sticker. The parking lot was outside of the final checkpoint where badges were checked. At the time of the accident, Petitioner was exiting his vehicle and had not yet gone into the secured area. He was still in transit to his work. Respondent Nuss was an employee of Respondent Rockwell, acting in the capacity of a security guard. There never has been a question about Nuss' negligence.

Other facts necessary for resolution of this Petition will be set forth in argument. It is sufficient to say that the defenses raised by Respondents all revolved around workmen's compensation as a bar to Petitioner's action.

STATEMENT OF THE CASE

After the accident, Petitioner filed a claim under the FTCA. This was filed with the United States Department of Energy which had assumed jurisdiction over the Rocky Flats Plant from previous government agencies. Nothing ever was done on the claim, and after six months had elapsed, Petitioner filed his initial complaint with the District Court. See 28 U.S.C. 2675(a). This complaint named only Respondent United States, as it was presumed that the plant was owned and operated by the Government.

After some discovery, it became known to Petitioner that the plant was owned by the United States, but that a contract was in effect which placed the day-to-day operation in the hands of Respondent

Rockwell International, Inc.(hereafter Rockwell). The amended complaint named Respondent Rockwell on the basis of diversity jurisdiction and Respondent Nuss on a pendent claim. Though the Court of Appeals appeared concerned about jurisdiction, that has never been an issue between the parties. It finally concluded that jurisdiction was proper (Appendix, infra at p. 34).

When discovery was completed, Respondents Rockwell and Nuss moved for summary judgment on the basis that Petitioner's claim was precluded by the Colorado Workmen's Compensation Act. They alleged that he had no other recourse, as he was covered on the parking lot and therefore could not sue either party. The District Court agreed and granted summary judgment (Appendix, infra at p. 63). This was affirmed by the United States Court of Appeals (Appendix, infra at p. 26).

After the granting of summary judgment, the District Court held a status conference. At that time, Respondent United States moved for the dismissal of the claims remaining against it. This was granted on the basis of failure to state a claim, with

Respondent United States being allowed to claim the same immunity as the other Respondents. The Court of Appeals correctly treated the review of this issue as one of summary judgment, rather than a motion to dismiss (Appendix, infra at p. 57). The result was the same, as the Respondent was allowed to use the Colorado Workmen's Compensation Act as a bar to the action brought under the FTCA.

The Court of Appeal's decision was issued on December 28, 1982. A petition for rehearing was filed promptly. The denial of the petition for rehearing was not entered until May 23, 1984 (Appendix, infra at p. 62). This Petition for Writ of Certiorari now follows.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT AGAINST THE PETITIONER.

The issue here involves the misapplication of Rule 56, Federal Rules of Civil Procedure, as well as provisions of the Colorado Workmen's Compensation Act(hereafter Act). This issue and that in Argument

II are intertwined.

Summary judgment was granted by the District Court on the basis that Petitioner had no remedy other than workmen's compensation. Little is set forth in that order as to reasoning (Appendix, infra at p. 63). The Court of Appeals affirmed, though conceding that Colorado law was perhaps not as clear-cut as thought by the trial court. It held that the ruling of the District Court was proper(Appendix, infra at p.45-46). The question before both courts was one of fact, not properly decided as a matter of summary judgment.

Summary judgment is to be granted when there is no disputed issue of fact. Rule 56, Fed.Rules of Civ.Proc. With a showing of factual dispute, summary judgment should not be granted. The burden is upon the party moving for summary judgment to show that there is no factual dispute. Both lower courts acknowledged that the applicable Colorado law mandates a showing of a connection between the injury and employment. C.R.S. §8-52-102. These courts further acknowledged that the applicable rule of law in Colorado is that travel to and from work is not considered work related, absent a showing of special circumstances(Appendix, infra at p.40).

See Rogers v. Industrial Commission, 40 Colo.App.313, 574 P.2d 116(1978). Recent decisions have again stressed that the burden is upon a workmen's compensation claimant to show a causal relationship between his or her work and the injury. Mineral County v. Industrial Commission of Colorado, 649 P.2d 728(Colo.App. 1982). Travel to and from work is not compensable, absent special circumstances. Colorado Civil Air Patrol v. Hagans, 662 P.2d 194 (Colo.App. 1983); also see Martin K. Eby Construction Co. v. Industrial Commission, 151 Colo. 320, 377 P.2d 745(1963). Further, an accident in a parking lot is not in and of itself sufficient to establish causal relationship. Matter of Welham, 653 P.2d 760 (Colo. App. 1982). As Respondents have conceded in the past, the parking lots were not used only for employees. This was acknowledged by the Court of Appeals (Appendix, infra at p.35). Nor has there ever been a formal adjudication of liability, as Respondent Rockwell filed an admission almost immediately (Appendix, infra at p.36). Respondents were not unaware of the massive exposure facing them, and workmen's compensation gave to them an expedient

means of trying to avoid it.

The question then becames one of why this Court should grant this Petition. Aside from the massive suffering of Petitioner, the reasons are these. First, both the Court of Appeals and District Court misapplied state law. This Court has the power, indeed duty, to correct such misapplication. The decisions of the lower courts presumed causal connection under the Colorado Workmen's Compensation Law. But see Finn v. Industrial Commission, 165 Colo. 106, 437 P.2d 542(1981); Kandt v. Evans, 645 P.2d 1300(Colo. 1982).

Second, the lower courts have misapplied the standard for summary judgment under Rule 56. A reading of both opinions clearly indicates that there was a resolution of facts. This is contrary to the standard for summary judgment. The issue of workmen's compensation is one of an affirmative defense, to be considered by the finder of fact. See Silkwood v. Kerr-McGee Corp., __U.S.__, 104 S.Ct. 615(1984). Resolution of any disputed facts will require a trial, not a grant of summary judgment.

Respondents have believed that they could pick and choose which Colorado statutes could be used at the plant site. The plant location is totally federally owned land, a point not disputed by Respondents. There is no indication in the Colorado Act that it is applicable on a federal reservation. Indeed, there is some question that the Colorado Legislature would have such authority. More will be discussed about this point in the second Argument. Likewise, Respondents may not pick and choose which statutes are then applicable. See C.R.S. 42-4-1401, et seq.(Colorado law enforcement officials will be contacted whenever there is a motor vehicle accident anywhere within the State, and this was not done in this case).

Respondent United States has not filed an election as mandated by the Act. In effect, Respondents have engrafted onto a federal reservation a state act which they find beneficial when facing a massive negligence case. Then they raise it as a preclusion of all other available remedies. The opinions of the lower courts expand a state compensation act without benefit of legal basis.

From this flows the result that Petitioner is therefore precluded from bringing his action because of this expanded coverage. This simply is not correct, and even more so in light of the misapplication of the Colorado Act itself.

The result reached by the lower courts runs counter to Rule 56, Federal Rules of Civil Procedure, as well as state law. It would be perhaps easy to simply brush aside this issue, but to do so would allow a precedent neither mandated by law nor supported by the record. Summary judgment was inappropriate in this case, as there was no causal connection with employment. This Court should grant this Petition and reverse the Court of Appeals, directing that a trial take place in this case.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT UNITED STATES WAS COVERED BY WORKMEN'S COMPENSATION INSURANCE.

Even more puzzling is the rationale of the Court of Appeals in affirming the dismissal of the United States as a defendant. It did not reach the issues raised by Petitioner, but rather held that the Respondent United States could utilize the workmen's

compensation coverage of Respondent Rockwell to escape liability. This ruling is an incorrect application of federal law.

The Rocky Flats Plant is a nuclear weapons production facility. The land upon which it sits is under total federal jurisdiction, a point conceded by Respondents. The entire production facility is owned by Respondent United States. 42 U.S.C. 2061. Indeed, the very intent of Congress precludes anything but ownership by the Government. Respondent Rockwell could not be a truly independent contractor due to the nature of the production facility. This is not a case controlled by United States v. Orleans, 425 U.S. 807 (1976). The Court of Appeals recognized this, but found that the mere fact that Respondent Rockwell had workmen's compensation coverage allowed Respondent United States to claim employer or landlord status, which would then preclude any liability under the FTCA. This analysis is incorrect and an impermissible extention of the law.

The Court of Appeals' analysis presumes applicability of workmen's compensation coverage.

From this flows the further assumption that Colorado law will allow the Respondent United States to claim statutory employer status. C.R.S. §8-48-101(1) & (2). The Court of Appeals also found that the FTCA specifically allowed such a defense to be raised. 28 U.S.C. 1346(b) and 2674. All of this reasoning was predicated on the assumption that Colorado law is applicable at the Rocky Flats plant and binding upon all parties. It should be noted that Respondent United States has not elected coverage. This the Court of Appeals did not feel was dispositive (Appendix, infra at p.51-52). It further ruled that the applicability could be predicated on 40 U.S.C. 290. Richardson v. United States, 577 F.2d 133 (10th Cir., 1978). The question about the import of this last cited statute has yet to be resolved by this Court, and lower court decisions have lead to confusion. See Roelofs v. United States, 501 F.2d 87 (5th Cir., 1974), cert.den. 423 U.S. 830; but see Peak v. Small Business Administration, 660 F.2d 374 (8th Cir., 1981).

The rationale of the Court of Appeals carries this result far beyond applicable law or case decision. The provisions of the Colorado Act do not include Respondent United States, its employees, or land totally under its jurisdiction. C.R.S. 8-41-105.

The error in the lower court's ruling is multifacited. First, the Atomic Energy Act precludes Respondent United States from turning over control of the Rocky Flats Plant to any private contractor. 42 U.S.C. 2061. Unlike the normal contract which would be entered into between the Government and a private contractor, the very nature of the production at the Plant mandates that Respondent United States be the employer, with control over production, facilities, and personnel. This has been provided by Congress in the previously cited statute. Respondent United States is the employer in this case, not Respondent Rockwell.

Second, Respondent Nuss' status as a security guard makes him an express employee and agent for Respondent United States. 42 U.S.C. 2201(k). Though this case was resolved on summary judgment,

the record reflects that Respondent Nuss was driving a security vehicle owned by Respondent United States and was acting in his position as a security guard. This has never been disputed. The status of Respondent Nuss was then one of a direct Government agent, not as an employee of an independent contractor. The negligence of Respondent Nuss was thus transmitted to Respondent United States.

Third, the Court of Appeals' extension of 40 U.S.C. 290 is unwarranted and improper. This statute is cited, in part, in the Appendix, infra at p.68. The lower court apparently believed that this statute was self-executing, and therefore applicable to the Rocky Flats Plant. Nowhere in 40 U.S.C. 290 is there any indication as to whom the law is applicable. At least one Court of Appeals has held that this section does not impose a duty on Respondent United States. See Peak v. Small Business Administration, supra. Indeed, it would seem difficult to believe that Congress intended this statute to apply to federal employees. See 5 U.S.C. 8101, et.seq.; also see Breeding v. Tennessee Valley Authority, 243 Ala. 240, 9 So.2d

6(1942). Further, Congress could not impose upon the several states automatic coverage under their workmen's compensation laws. It would incumbent upon the several states through appropriate legislation to extend these acts to include exclusively federal jurisdictions. The Colorado Legislature has taken no such step. See C.R.S. 8-41-105(definition of employers); C.R.S. 8-41-106(definition of employees).

The Court of Appeals reasoning from 40 U.S.C. 290 allows Respondent United States to use this as a means of avoiding liability. To do so requires applicability of the Act at the plant. As this Court has said only recently, there must be a careful reading of Congressional intent, particularly if there is a question as to other remedies. See Silkwood v. Kerr-McGee Corporation, supra. The immunity granted to an employer from a workmen's compensation law will require narrow contruction, as well as a careful examination of the applicable law. See Washington Metro Area Transit Auth. v. Johnson, __U.S.__, 104 S.Ct. 2827(1984); also see Potomac Elec.Power Co. v. Director, 449 U.S. 268(1980). The reliance by the

Court of Appeals upon 40 U.S.C. 290 is misplaced, and an erroneous interpretation and extension of that statute.

Third, the Court of Appeals held that Respondent United States was a statutory employer under C.R.S. 8-48-101(2), and thus entitled to claim immunity from a subcontractor. This is inconsistent with the position advanced throughout by Respondents, that being that a true independent contractor status existed. C.R.S. 8-48-103. On the other side of the coin, the Court of Appeals' ruling means that Respondent United States would be directly answerable under the Act if no compensation coverage existed. See Standard Oil Company v. Industrial Commission, 38 Colo.App. 39, 552 P.2d 1029(1976). No authority exists for this proposition. In either case, the ruling of the lower court is neither consistent with the law nor facts in this case.

Finally, the nature of the record at this point precluded summary judgment as to Respondent

United States. Respondent Nuss was acting in his capacity as security guard. As has been shown, he was an agent of Respondent United States pursuant to 42 U.S.C. 2201(k). He was in a security vehicle owned by Respondent United States. Respondents have argued that the Government contracted with Respondent Rockwell for a turnover of everything, including vehicles. This is legally impossible under 42 U.S.C. 2061. This line of reasoning allows Nuss to be considered as a co-employee and therefore immune from any action dealing with his negligent acts. The position of Respondent Nuss was different from that of a fellow employee. He was not a fellow employee, and therefore not immune from suit. See generally Frohlick Crane Service, Inc. v. Mack, 182 Colo. 34, 510 P.2d 891(1973).

The Court of Appeals' reasoning stretches the applicable statutes beyond their breaking point. To reach the point of allowing immunity to Respondent United States, the lower courts had to find a binding effect of the Act on federal reservations. No such authority exists, absent an explicit state declaration that its workmen's compensation act will apply on

exclusive federal jurisdiction properties. No such grant exists in Colorado. Further, Respondent Nuss was acting as an agent of the Respondent United States. He was driving a Government car, had arrest authority conferred by Congress, and was acting in the capacity of security guard. The granting of the motion to dismiss/motion for summary judgment was improper.

CONCLUSION

The issues in this case appear to be easier than they are. The lower courts could discern that substantial injuries are present, and the negligence of Respondent Nuss is not open to question. The only available defense is that of raising workmen's compensation as a bar. This was relied upon by both lower courts, with the application of 40 U.S.C. 290 by the Court of Appeals. As has been shown, the Colorado Legislature has not specifically directed that its Act apply on federal reservations. There is no legal support for the rationale of the lower courts.

Even if the Act applied, the lower courts have misapplied the law. Petitioner was in transit to his work at the time of the accident. He merely

reached back into his car for his lunch pail. There is no causal connection between his massive injuries and his work, as required under Colorado law. Merely being in a parking lot is not enough. Further, the issue of workmen's compensation as a bar to civil litigation is a matter to be resolved at trial, not on a motion for summary judgment. The disputes that exist in the record may not be resolved except at a trial.

This Court should grant the Petition and reverse the decision of the Court of Appeals. This matter should be set for trial.

Respectfully submitted,

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APPENDIX-OPINION OF U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LEROY STEWART,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v	)	No. 80-1329
	)	
UNITED STATES OF AMERICA, GARY D. NUSS, and ROCKWELL INTERNATIONAL CORPORATION, a Delaware Corporation,	)	
	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. Civil 78-K-1061)

Richard M. Borchers, Westminster, Colorado(John E. Joslin, Kansas City, Missouri, was on the brief) for Plaintiff-Appellant

James E. Elliott, Jr.(Elliott, Martinez & Allman, Denver, Colorado, was on the brief) for Defendants-Appellees Rockwell International Corporation and Gary D. Nuss

Jake J. Chavez, Assistant United States Attorney (Joseph F. Dolan, United States Attorney, and Donald M. Hoerl, Assistant United States Attorney, Denver, Colorado, and Jan Elizabeth Mitchell, United States Department of Energy, Albuquerque, New Mexico, were on the brief) for the Defendant-Appellee United States of America

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Before SETH, Chief Judge, and HOLLOWAY and McKAY, Circuit Judges

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HOLLOWAY, Circuit Judge

In this suit brought against the United States under the Federal Tort Claims Act (FTCA), plaintiff-appellant Leroy Stewart appeals a dismissal as to the defendant United States and a summary judgment granted for defendants Gary Nuss(Nuss) and Rockwell International Corporation(Rockwell), also named as defendants. Plaintiff seeks damages for personal injuries incurred in a parking lot accident at the Rocky Flats nuclear weapons facility in Colorado, owned by United States and operated by Rockwell, charging negligence against all defendants. The injury is alleged to have occurred on May 20, 1976, when plaintiff was struck, while exiting his car in the parking lot on arrival for work, by a Government vehicle driven by Nuss, who was on a security patrol.

I.

Plaintiff originally sought relief solely against the United States under the FTCA, 28 U.S.C. §2671 et seq. and 28 U.S.C. §1346(b). His amended complaint also named Rockwell and Nuss as defendants. The amended complaint asserted jurisdiction pursuant

to the FTCA. It also claimed diversity jurisdcition as to Rockwell and pendent jurisdiction as to Nuss. Defendants have not challenged subject matter jurisdiction as to any of the claims except by a formal denial earlier in the answer of Rockwell and Nuss of pendent jurisdiction as to Nuss.(See note 2, infra).

However as we must, we note that there is a question as to whether pendent jurisdiction is proper as to a non-diverse party such as Nuss. See, e.g., Ayala v. United States, 550 F.2d 1196(9th Cir.). Moreover, we have also noted, sua sponte, that the amended complaint failed to aver the principal place of business of Rockwell, which prevented reliance on diversity jurisdiction as to the corporation at that point. American Motorists Ins. Co. v. American Employers' Ins. Co., 600 F.2d 15(5th Cir.); Walsh v. International Precious Metals Corp., 510 F.Supp 867, 873(D.Utah); see Fed.R.Civ.Proc., 8(a)(1)(requiring a short and plain statement of grounds of jurisdiction). We requested supplemental briefing from the parties on the question of whether there was proper subject matter jurisdiction of the claims against Rockwell

and Nuss. The supplemental brief of Rockwell and Nuss noted that Rockwell's diversity of citizenship was never questioned below and suggested that Rockwell be treated as diverse. Rockwell's supplemental brief included an affidavit stating that its principal place of business is in Pennsylvania. The Government submitted a statement on jurisdiction which adopted the position of Rockwell and Nuss. On consideration of the supplemental briefs, the affidavit and the Government's statement, we will treat the matter as an unopposed motion to amend the complaint to cure the defective diversity allegation as to Rockwell, which we grant. 28 U.S.C.A. §1653; 3 Moore's Federal Practice §15.11(2d ed. 1982).

The question remains whether there is proper subject matter jurisdiction of the claim against Nuss as a matter of pendent jurisdiction. By their supplemental statements on jurisdiction, filed by the parties at the direction of the court, all the parties take the position that the district court properly exercised pendent jurisdiction over Nuss. The question

is, however, "subtle and complex," Aldinger v. Howard, 427 U.S. 1,2, and we feel we must note and carefully decide it because it touches on constitutional and statutory foundations of jurisdiction.

Jurisdiction of the claim as to Nuss involves more than just the assertion of two claims, one federal and one non-federal, in litigation between the same parties plaintiff and defendant. E.g. Hurn v. Oursler, 289 U.S. 238; United Mine Workers v. Gibbs, 383 U.S. 715. The asertion of a separate claim arising out of the same operative facts concerning conduct of the same parties, but as a pendent claim against an added party, implicates the so-called "pendent party" problem where jurisdiction was held lacking as to the pendent party in Ayala v. United States, 550 F.2d 1196(9th Cir.), in an FTCA case. The problem involves both Article III constitutional power and the statutory basis for such jurisdiction. See Aldinger v. Howard, 427 U.S. 1,18.

We note that plaintiff's complaint is based on the single accident in the Rocky Flats parking lot. Further, the claim against the United States under the

FTCA properly invoked the subject matter jurisdiction conferred by that Act exclusively on the federal district courts. And we are satisfied that the claim asserted under the FTCA has sufficient substance so that it was proper to invoke that jurisdictional grant. To these circumstances we apply the guidelines laid down in Gibbs which are instructive here in deciding the pendent party question:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constition, the Laws of the United States, and Treaties made, or which shall be made, under their Authority...." U.S. Const., Art.III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garriques Co. v. Morrin, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. 383 U.S. at 725.(emphasis in original)(footnotes omitted).

We are persuaded that under these concepts subject matter jurisdiction of the claim against Nuss exists, pendent to that of the claim under the FTCA against the Government, in accord with the constraints of Article III. Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023, 1024 n.1(5th Cir.), cert.denied, 440 U.S. 908; Johnston, et al. v. United States, et al., 546 F.Supp 879(D.Kan.); Dumansky v. United States, 486 F.Supp 1078, 1086-89(D.N.J.); Pearce v. United States, 450 F.Supp 613, 619(D.Kan.); Maltais v. United States, 439 F.Supp 540, 547 (N.D.N.Y.); cf.Florida East Coast Railway Co. v. United States, 519 F.2d 1184(5th Cir.); Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1154-55 (10th Cir.), cert.denied, 435 U.S. 1006; State of New Mexico v. Molybdenum Corp. of America, 570 F.2d 1364, 1367 (10th Cir.). Contra, Kack v. United States, 570 F.2d 754(8th Cir.); Ayala v. United States, 550 F.2d 1196 (9th Cir.), cert.dismissed per stip., 435 U.S. 982; Falk v. United States, 264 F.2d 238(6th Cir.). While Aldinger rejected pendent jurisdiction in the context of a claim principally asserted under §1983, the Court

noted that different considerations apply where there is a case like this one under the FTCA which confers exclusive jurisdiction on the federal court[1]:

> Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. §1346, the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together....

427 U.S. at 18(emphasis in original).

Moreover, we find no congressional disapproval of the exercise of such pendent party jurisidiction in the FTCA. The waiver of immunity, granting jurisdiction to the federal district courts of such tort suits against the Government, was made in "sweeping language." United States v. Yellow Cab Co., 340 U.S. 543, 547. Moreover the grant of jurisdiction was made exclusively to the federal courts. Thus there is no indication that Congress declined to extend federal jurisdiction over such a pendent party as was the case in Aldinger. See 427 U.S. at 16-19.

We hold, therefore, that subject matter jurisdiction in the district court existed of the claim against Nuss as one over which the district court properly exercised jurisdiction, pendent to the claim against the Government under the FTCA over which the federal court has exclusive jurisdiction.[2]

II

Most of the facts concerning the accident and the workmen's compensation defenses are undisputed and can be stated briefly.

On the morning of May 20, 1976, plaintiff left for work and picked up two co-employees who shared a car pool with him. Plaintiff's employment at this time was as a probe and cable fabricator. By rotating the driving duties, plaintiff drove his car approximately every third day. The routine of the car pool was to arrive at the Rocky Flats plant in time to have coffee and change into work clothing before the beginning of their 7:30 a.m. shift.

Plaintiff was not being paid for work at the time of the accident and pay was not to start until 7:30 a.m. As the riders approached the plant, they

passed through a security checkpoint where they displayed their indentification badges to security personnel. They continued to Parking Lot No 50 where they were to leave the car and pass a final security checkpoint before entering Building No. 750 to change clothes. Parking places were unassigned in the parking lot, which was used because it was most convenient. The lot was used by persons other than plant employees.

They parked in Lot No. 50. Plaintiff's riders left the car and he stepped out of the automobile. As he reached back into the car for his lunch pail, he was crushed against the car by a Government vehicle. This occurred at about 7:06 or 7:08 a.m.[3] Plaintiff suffered compound fractures of both ankles, a tibia plato fracture of the right leg, and a deep laceration of the upper left thigh about twelve inches long. In August 1979 plaintiff's right leg was amputated, a procedure necessitated by osteomyelitis. His medical expenses have exceeded $75,000.

Defendant Gary Nuss was the driver of the

Government vehicle. He was employed in the Rockwell Plant Protection Department and was performing his regular guard duties near the end of his midnight shift. An investigation revealed that he had fallen asleep at the wheel of the vehicle. The parties agree that Nuss was acting within the course and scope of his employment at the time of the accident.

Four days after the accident(May 24, 1976), Rockwell filed an accident report with the Colorado Division of Labor(the Division). In June 1976 Traveler's Insurance Company(Traveler's), Rockwell's workmen's compensation carrier, submitted an admission of liability for the accident to the Division. In October and November of that year, plaintiff lodged an accidental injury claim for compensation and an "Election of Remedies" with the Division, electing workmen's compensation coverage. He received benefits from both Traveler's and Social Security.

The Rocky Flats installation is situated on a 6500 acre tract owned by the United States in fee simple for the sole purpose of fabricating nuclear weapons parts.(United States v. State of Colorado, 460

1184, 1186(D.Colo.); II R.53). Though the actual operation of the plant is accomplished through private companies under management contracts, no work on behalf of any private entities is undertaken there. Since June 1975 the plant has been operated under a management contract with Rockwell, which is charged with managing, staffing, maintaining, and operating the plant. (II R. 67,70). Under the management contract the Department of Energy provides all funds to sustain the operation. No money or property of Rockwell is used. The contract with Rockwell provides that persons employed by Rockwell shall not be deemed employees of the Government.(II R. 70).

Under Rockwell's contract with United States, Rockwell is required to maintain workmen's compensation insurance for the benefit of its employees. (II R. 213, 233). The contract provides that Rockwell will receive an annual negotiated fee for its management services in addition to reimbursement for its operating expenses, including the cost of workmen's compensation insurance. (II R. 77, 82).

Plaintiff's complaint averred that the Government, Rockwell and Nuss were all liable for his injuries due to their negligence. After discovery, Nuss and Rockwell filed motions for summary judgment claiming the Colorado Workmen's Compensation Act(Act) barred plaintiff's common law remedy. The Government also sought summary judgment, arguing that its status as a "statutory employer" under the Act freed it of liability on such a claim.

The district court granted summary judgment for Nuss and Rockwell, holding that the Act constituted plaintiff's exclusive remedy. At a subsequent status conference the Government made an oral motion to dismiss for failure to state a claim on which relief can be granted. Fed.R.Civ.P.,12(b)(6). The motion was granted based on the "statutory employer" argument and this timely appeal followed from all these adverse rulings.[4]

Plaintiff urges several grounds for reversal of the summary judgments and dismissal. He contends that under Colorado law injuries incurred by an employee while travelling to and from work are not

compensable under the Act, that plaintiff's common law remedy is not foreclosed, and that material factual issues concerning applicability of the Act prevent summary judgment. Plaintiff also maintains that dismissal as to the United States was improper if the Government, and not Rockwell, was the actual employer. He reasons that, in this scenario, workmen's compensation coverage secured by an employee of the United States (Rockwell) will not insulate the United States from suit. Further, the employer United States must make an election to be covered by the Act, which plaintiff says it has not done. Plaintiff also argues that the Act does not apply to territory owned in fee simple by the United States.

Plaintiff further says that Rockwell improperly influenced his decision to file a claim for workmen's compensation benefits and forego a tort action. Finally, plaintiff claims that the district court's order is defective for failing to satisfy specificity requirements of Rules 56 and 52, Federal Rules of Civil Procedure.

III

Plaintiff first contends that the district court erroneously concluded that his injury arose "out of and in the course of employment" as required by the Colorado Workmen's Compensation Act.[5] Plaintiff argues that this incorrect conclusion resulted in the equally erroneous holding that the Act barred suit against defendants Rockwell and Nuss by virtue of its exclusivity provisions.[6]

Plaintiff correctly notes that, in general, injuries going to and from work are not within the ambit of the Act. Rogers v. Industrial Commission, 40 Colo.App 313, 547 P.2d 116. Absent some special circumstances, plaintiff urges, a parking lot injury sustained before work hours is not causally related to employment as contemplated by the Act.

In factual support of his contention that the Act is inapplicable, plaintiff observes that: (1) he was only exiting his car and had made no move toward Building 750; (2) he was not paid for any time spent changing clothes prior to starting time, though he was paid for time spent changing in the afternoon;

(3) before work commenced he had to clear a final security check; (4) the parking lot was open to persons other than Rockwell employees such as repairmen and spouses picking up employees; (5) use of the lot was not mandatory, and (6) parking spaces within the lot were unassigned.(Appellant's Opening Brief, pp.10-11). These facts indicate, he maintains, that he was still in transit to his workplace at the time of the accident and no causal connection linked his injury to his employment.

The totality of the circumstances must be examined in such case to determine if there is a sufficient nexus between employment and injury to say that the accident occurred within the scope of employment. City & County of Denver School Dist. No. 1 v. Industrial Commission, 196 Colo. 131, 581 P.2d 1162, 1163. Under Colorado law, an injury arises out of and in the course of employment even though incurred on the way to work if special circumstances create a causal connection between the employee's injury and employment. Woodruff World Travel, Inc. v.

Industrial Comm., 38 Colo.App. 92, 554 P.2d 705,707. The Act may encompass injuries received on the premises after work hours, Maintenance Management, Inc. v. Tinkle, 40 Colo.App. 80, 570 P.2d 840(1977) (employee returns to premises without express authority one and one half hours after work), off the premises after work hours. State Compensation Insurance Fund v. Walter, 143 Colo. 549, 354 P.2d 591 (employee walking along public street to assigned parking place from university shop work place), and in the employee parking lot shortly before work started. Sieck v. Trueblood, 29 Colo.App.432, 485 P.2d 134.[7]

Further, Colorado case law indicates that it is not determinative that the employee is not required to arrive at work in a car or that the employer is not obliged to provide parking. Walter, 143 Colo. at ___, 354 P.2d at 594, quoting 99 C.J.S., Workmen's Compensation §234, p.833. It is not decisive that the employer of an injured employee is not the record title owner of the parking lot where the injury occurred. Woodruff, 38 Colo.App.at __, 554 P.2d at 706 (landlord makes parking lot available to tenant's

employees), or that the injured employee was not being paid at the time of the injury. Kitchens v. Department of Labor & Employment, 29 Colo.App. 374, 486 P.2d 474, 475-76(gunshot injury to plaintiff in employer's parking lot just before work commenced). Rather such circumstances are only factors in the decisional calculus. City & County of Denver, 196 Colo. at ___, 581 P.2d at 1163. In all the authorities cited in the proceding two paragraphs, the employee's injury was adjudged work-related.

Plaintiff seeks to distinguish these cases by contending that no causal connection between the employment and injury can be established where the "only thing present was the mere happenstance that [plaintiff] was in the parking lot getting out of his car." (Appellant's Opening Brief, p. 14). Plaintiff argues correctly that the mere presence of the injured employee on the employer's premises is, without more, insufficient to invoke the bar of the Act. Finn v. Industrial Comm., 165 Colo. 106, 437 P.2d 542; Rocky Mountain Fuel Co. v. Kruzic, 94 Colo. 398, 30 P.2d 868; McKnight v. Houck, 87 Colo. 234, 286 P.279.

The Sieck case is instructive on the scope of the Act in this type of case. There the injured employee, a truck driver, arrived at his employer's place of business, a trucking firm, at 7:15 a.m. for a work shift commencing at 7:30. As was his custom(and that of several other drivers), he drove his car across the truck yard to warm up his tractor motor before work. At that time he collided with a truck driven by a co-employee. The Colorado Court of Appeals held that the injury occurred within the scope of employment. The court focussed on the mutual benefit of this conduct to employee and employer, even though the benefit to the employer was slight. 485 P.2d at 135. Accord, Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2; Walsh v. Industrial Commission, 34 Colo.App. 371, 527 P.2d 1180.

In the instant case, plaintiff testified at deposition that his supervisior expected employees to be dressed and ready for work at 7:30.[8] (VII R. 71). Further, Rockwell expected that employees would drive or ride in private vehicles because there was no

other transportation to the plant. (IV R.415). While other uses of Lot No. 50 occurred (IV R.307), plaintiff admits the principal use was for employee parking. (VII R. 51). Both plaintiff and his employuer benefitted from the availability of the lot. See Brogger v. Kezer, 626 P.2d 700(Colo.)(test to determine if injury arises "out of and in the course" of employment is whether acts or employee were solely for his own benefit). The reciprocal benefit and the express or implied direction of plaintiff's supervisor concerning starting time bring this case squarely within the rule of Sieck and other authorities cited above.

The Act is to be broadly and liberally construed to achieve its salutary purposes. Finnerman v. McCormick, 499 F.2d 212, 214(10th Cir), cert denied, 419 U.S. 1049. Chief among the Act's purposes is that the employee is favored with speedy compensation regardless of fault, the employer is granted immunity from common law claims, Frohlick Crane Service, Inc. v. Mack, 182 Colo. 34, 510 P.2d 891, 893, and in return a vicarious statutory

liability is substituted. See generally Thomas v. Farnsworth Chambers Co., 286 F.2d 270, 273(10th Cir.). The district court correctly recognized these purposes by ruling that plaintiff's suit against Nuss and Rockwell is barred by the Act. Sieck, supra, 485 P.2d at 135; Varsity Amusement Co. v. Butters, 155 Colo. 330, 394 P.2d 603. We are persuaded that the ruling was proper in light of the Colorado law.

IV

Plaintiff acknowledges that the Government is not responsible under the Federal Tort Claims Act for liabilities of truly "independent contractors," citing United States v. Orleans, 425 U.S. 807. (Appellant's Opening Brief at p. 18). Plaintiff argues that the question of whether Rockwell is a truly independent contractor is one of fact which cannot be decided on the present record so that the summary dismissal as to the Government was error.

Reaching the substance of the issue, plaintiff further says that the United States retains virtually complete control over production of nuclear weapons because of their very nature. Therefore

Rockwell is only an "alter ego" acting on behalf of the Government. Plaintiff asserts that the United States has not made an election to be covered by the Act as required. Furthermore he says a suit like his is not barred where workmen's compensation coverage is secured by Rockwell as an "alter ego." Finally plaintiff contends the Act does not apply to territory owned in fee simple by the United States. Thus palintiff maintains he is entitled to recover from the Government for negligent supervision of its vehicle and Nuss. (I R.2).

We must reject the argument that genuine issues of fact barred the dismissal as to the Government. We sustain the ruling of the district court without determining whether an "independent contractor" relationship existed in the ordinary sense. We hold instead that on the undisputed facts Colorado law, made applicable under the FTCA, afforded the Government immunity from this action as a "statutory employer" since Rockwell, as required by its contract to perform work for the Government, obtained workmen's compensation insurance which

covered the plaintiff's injury.

The FTCA authorizes suit against the United States for personal injuries inflicted by the negligent or wrongful acts or omissions of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§1346(b) and 2674. Thus plaintiff's right to prevail on the merits of his tort claim turns on the interpretation of Colorado law. The Colorado Workmen's Compensation Act provides, inter alia, a derivative immunity from a negligence suit to anyone who contracts with another for work to be done when the party to whom the work is contracted secures workmen's compensation insurance. C.R.S. §8-48-101(1),(2).[9] The Act declares that the party who contracts the work away shall be construed to be the employer. §8-48-101(1). If the party to whom this statutory employer has contracted work out fails to secure workmen's compensation insurance, the statutory employer is liable to respond in damages to the injured employees of the other party. Edwards v.

Price, 191 Colo. 46, 550 P.2d 856, 860, appeal dismissed, 429 U.S. 1056. This statutory employer immunity was recently at issue in Posey v. Intermountain Rural Electric Ass'n, 41 Colo.App. 7, 583 P.2d 303. There the court stated that a "corporation will be determined to be a statutory employer when it contracts out work which is a part of its regular business and which would ordinarily be accomplished with its own employee," id. at 304, and held the defendant immune from suit.

Plaintiff nevertheless argues that the Government and not Rockwell is the actual empoloyer at Rocky Flats. He relies on the testimony of James Nicks, the Department of Energy assistant area manager for administration for the Rocky Flats area in a criminal trespass case unrelated to the present action.(V. R. 484-500). Mr. Nicks testified that approximately 50 Department of Energy employees are stationed at Rocky Flats, with a third of them involved in monitoring operational aspects of the facility such as inspection and quality control. These facts, plaintiff reasons, demonstrate that the United

States is the actual employer. Therefore, workmen's compensation coverage secured by Rockwell does not shield the Government, especially if it has not made the election to be covered as required by the Act. Plaintiff says that a trial is required to ascertain the Government's exact status and "[p]laintiff would suggest that insurance secured by someone else will not suffice under the Colorado Workmen's Compensation Act so as to preclude a lawsuit." (Appellant's Opening Brief at 19).

Plaintiff does not cite Colorado authority for this proposition. It appears that his interpretation runs against the plain language of §8-48-101(2) itself. See note 9, supra. The Act specifically bars an "action of any kind," inter alia, against the person contracting out the work when the party to whom the work is contracted obtains workmen's compensation coverage. In effect, the Act requires an employer such as the United States to make certain that the party to whom the work is contracted has obtained such insurance or face the risk of suit. In this manner the Legislature has assured that

employers will not evade the protective policy of the Act by contracting with uninsured parties to perform the employer's work. Frohlick Crane Service Inc. v. Mack, 510 P.2d 891, 893(Colo). Colorado case law does not indicate that these duties are imposed solely for the principal-independent contractor relationships as the term is understood in agency law. Rather the statute is intended to cover normal business conducted through the activities of another under various kinds of contractual relationships. Faith Realty & Development Co. v. Industrial Comm., 170 Colo. 215, 460 P.2d 228, 230. This conclusion is supported by the fact that the immunizing provision also extends to lessors and lessees. See n.9, supra.

Plaintiff's argument that the United States has not elected coverage is not persuasive. First, the statutory employer immunity provisions do not speak of an express election. Second, as noted, the United States-Rockwell contract requires Rockwell to maintain workmen's compensation insurance as an allowable operating expense. (II R.213,82). Finally, Rockwell did in fact obtain and maintain such insurance. Moreover, plaintiff's contention that state

workmen's compensation acts do not apply to land owned by the Government is patently untenable. See 40 U.S.C. §290;[10] Travelers Insurance Co. v. Cardillo, 141 F.2d 362, 363(D.C.Cir.).

Had a private corporation, instead of the Government, as part of its normal business contracted with another for the operation of Rocky Flats, the corporation would be immune from suit by plaintiff as a statutory employer. See e.g., Posey, 583 P.2d at 304-305; O'Quinn v. Walt Disney Products, Inc., 177 Colo. 190, 493 P.2d 344(construing C.R.S. §81-9-1 (1963), the predecessor Workmen's Compensation Act); Herriot v. Stevenson, 172 Colo. 379, 473 P.2d 720(to the same effect, but finding intermediate employer uninsured). Plaintiff has not explained why the United States should be denied the statutory employer immunity available to a private party. No reason for such a result is apparent. Despite whatever characterization plaintiff appends to the United States-Rockwell relationship, we are persuaded that the statutory employer immunity bars his suit under Colorado law and that the district court properly

dismissed his suit against the Government. See Roelofs v. United States, 501 F.2d 87, 93(5th Cir.), cert. denied, 423 U.S. 830(applying Louisiana workmen's compensation law to an Army munitions plant operated by Speery Rand); Oveda v. United States, 508 F.Supp. 255 (E.D.Tex.)(collecting other federal cases applying to the United States the statutory employer defense); Scanlon v. United States, Civil No. 78-F-509(D.Colo., June 21, 1979).[11]

V

There remain several miscellaneous arguments of plaintiff which we will briefly treat.

Plaintiff argues that agents of Rockwell and Travelers improperly influenced him to elect the workmen's compensation exclusive remedy in order to reduce their liability. (See VII R. 84-87). The district court stated that there simply was no election to be made. The workmen's compensation claim was received by the Department of Labor and Employment on October 26, 1976,(I R.36), five months after the accident. (VII R.53). There are no circumstances indicating that defendants' opportunings overcame the will

of plaintiff and his counsel. However, the district court's holding on this point is grounded on the idea that there was no prejudice to plaintiff when he had no other remedy aside from workmen's compensation benefits. This conclusion is sound. See Varsity Amusement Co. v. Butters, supra, at 394 P.2d at 305. No reasoning based upon plaintiff's "election" appears to have entered into the court's decision to dismiss the action against the Government or to grant the summary judgment for Rockwell and Nuss. (VI R. 2-13).

Plaintiff also contends that the district court's orders are defective for failing to state the facts on which it relied or the reasoning it used. Plaintiff urges that the "provisions of Rule 56, Federal Rules of Civil Procedure, cannot be read separately from Rule 52 which requires specificity in a trial court's findings of fact and conclusions of law." (Appellant's Opening Brief, page 7). However Rule 52(a) expressly states, in pertinent part, that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule

41(b)." See also Williams v. Eaton, 443 F.2d 422, 433(10th Cir.). Because the court's orders were not entered pursuant to Rule 52, which requires findings after a non-jury trial, or pursuant to Rule 41(b) requiring similar findings when a plaintiff's case is dismissed after presentation of his evidence, the language quoted above from Rule 52 would appear to dispose of plaintiff's contention. Further, plaintiff was advised of the reasoning of the court by the judge's orders and comments on record. (V R. 514-16);VI R. 2-13).[12]

Lastly, plaintiff maintains that the failure of defendants to file a report with local police shows that defendants did not treat Colorado law as applying to the plant and that this further demonstrates that the provisions of the Colorado Workmen's Compensation Act are also inapplicable to the plant on federal land. Plaintiff notes that C.R.S. 1973 §§42-4-1401, 1403 & 1406 require police reports of all accidents within the state resulting in injury. These sections are not a part of the Workmen's Compensation Act which contains its own reporting requirements. C.R.S. 1973

§8-45-101. Defendants complied with the reporting requirements of that Act. (IV R. 308). Plaintiff's argument on this point is without merit.

VI

We are convinced that no error is demonstrated in the rulings made by the district court on this record. Accordingly, the judgments entered are

AFFIRMED.

FOOTNOTES

[1] In Aldinger the Court quoted an observation from Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894(4th Cir.), that the arguments for federal pendent jurisdiction are not the only consideration to be taken into account; that especially is so where the efficiency the plaintiff seeks is available in the state courts. 427 U.S. at 15. In the instant case, of course, such efficiency is unavailable because the FTCA vests exclusive jurisidction of the claim against the government in the federal courts.

[2] While there is no express statement in our record that the district court concluded it should exercise its discretion to entertain the claim against Nuss, that determination is implicit in the disposition of the claim against him on the merits since the complaint alleged only pendent jurisdiction as to Nuss. The amended complaint alleged that "[j]urisdiction over defendant NUSS is pendent to the jurisdiction over the other defendants." (I R.1). The Government's answer stated that such conclusions of law need not be admitted or denied. (I R. 6). The answer of Rockwell and Nuss stated that they were without sufficient knowledge and information to form a belief as to this allegation and therefore denied it. (I R. 9).

[3] Plaintiff's deposition testimony indicates that he arrived at Lot No. 50 at 7:08 a.m. (VII R.15). A Rockwell investigation found that the accident occurred at 7:06 a.m.(III R. 533).

[4] Though both counsel for the Government and the court discussed the motion as one brought under Rule 12(b)(6), Fed.R.Civ.P., we note that matters outside of the pleadings were presented and relied upon in disposition of the motion. Therefore, we treat the motion as a "speaking motion," or motion for summary judgment, as provided in Rule 12(b), Fed.R.Civ.P.

[5] C.R.S.973 §8-52-102 states:

(1) The right to compensation provided for in [the Act] in lieu of any other liability to any person for any personal injury or death resulting therefore, shall obtain in all cases where the following conditions occur:

(a) Where, at the time of the injury, both employer and employee are subject to the provisions of said article and where the employer has complied with the provisions thereof regarding insurance;

(b) Where, at the time of the injury, the employee is performing service arising out of and in the course of his employment;

(c) Where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of his employment and is not intentionally self-inflicted. (Emphasis added).

[6] C.R.S. §8-42-102 provides:

"An employer who has complied with the provisions of Articles 40 to 54 of this title, including the provisions relating to insurance, shall not be subject to the provisions of Section 8-42-101; nor shall such employer or the insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability for the death or personal injury to any employee, except as provided in said article; and all causes of action at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any persons are abolished except as provided in said articles." (Empahsis added).

The Act has been construed to bar suits by one employee against a co-employee for injuries sustained while both were acting within the course of their employment, Sieck v. Trueblood, 29 Colo. App.

432, 485 P.2d 134,135; C.R.S. 1973 §8-42-102, just as a claim against an employer is barred. Varsity Amusement Co. v. Butters, 155 Colo. 330, 394 P.2d 603, 605. From the record it is clear that Nuss was acting within the course and scope of his employment by Rockwell and we reach the same conclusion as to plaintiff for reasons that follow.

[7] See also Divelbiss v. Industrial Comm., 140 Colo. 452, 344 P.2d 1084, 1086, quoting with approval 1 Larson's Workmen's Compensation Law, §21.60, p. 313: "The course of employment, for employees having a fixed time and place of work, embraces a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts such as washing or changing his clothes."

[8] In Appellant's Opening Brief, p. 10, plaintiff states that his arrival time was not "a result of any employer directive or request." At plaintiff's deposition the following colloquy took place(VII R. 71-72):

> Q. And was it Mr. Johnson's expection that you would be there ready to work at 7:30 with coveralls on?
> A.[Plaintiff] Yes, he was starting that.
> Q. So you were expected then to be ready at 7:30 with your coveralls on to start work on your shift, is that correct?
> A. In your area--or 7:30, you mean?
> Q. Yes.
> A. Right.
> Q. So this was one of the reasons for coming somewhat earlier, was to be able to get through the security checkpoint, get to the locker, change clothes and be ready to work at your particular area in 76 at 7:30 a.m.? Is that correct?
> A. Yes, and to kind of have a cup of coffee before we start.

The disparity between these statements and plaintiff's brief on appeal does not appear to create a contested

factual issue preventing summary judgment. See e.g., H.B. Zachry Co. v. O'Brien, 378 F.2d 423(10th Cir.). In light of the "totality of circumstances" test used by Colorado courts, we feel the conclusion drawn by the district court from the facts as detailed is not in error.

[9] Section 8-48-101(2) provides:

(2) If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work insures and keeps insured his liability for compensation as provided in articles 40 to 54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind, including actions under sectioon 8-52-108, against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof.

[10] The relevant provisions of 40 U.S.C. §290 read as follows:

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if the said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be. (Emphasis added).

[11] We are mindful that we denied a statutory employer defense to the Government in Richardson v. United States, 577 F.2d 133(10th Cir.). There we applied Florida law and determined that the Government was not entitled to the statutory employer defense because it was not a "contractor," since it had no contractual relationship with the subcontractor which employed the plaintiff. Id. at 135. We distinguished Roelofs by noting that it was assumed in that case that the United States would have been immune from a third party tortfeasor action, had it been a private employer. Id. at 137. However, in Richardson we concluded that, if the United States had been a private employer, it would not have been immune. Id. In light of these substantial difference, Richardson does not conflict with our conclusion here. See id. at pp.135-37.

[12] We are mindful of our decisions in Hill v. Morton, 525 F.2d 327(10th Cir.); Heber Valley Milk Co. v. Butz, 503 F.2d 96(10th Cir.); and Nichol v. United States, 501 F.2d 1389(10th Cir.). We feel that their requirements of findings as a statement of reasons for ruling in particular types of cases are not at variance with what we hold here, namely that the district court's orders, taken together with the court's statements from the bench, gave the grounds for the ruling adequately.

ORDER DENYING PETITION FOR REHEARING

MAY TERM-May 23, 1984.

Before the Honorable Oliver Seth, Honorable William J. Holloway and Honorable Monroe G. McKay, Circuit Judges

LEROY STEWART,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 80-1329
	)	
UNITED STATES OF AMERICA, GARY D. NUSS, ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation,	)	
	)	
Defendants-Appellees.	)	

This matter comes on for consideration of the petition for rehearing filed by appellant in the above captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk.

DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

LEROY STEWART,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	78-K-1061
v.	)	
	)	
UNITED STATES OF AMERICA, GARY D. NUSS, and ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation,	)	
	)	
Defendants.	)	

KANE, District Judge

The above-entitled action is currently before the court on defendant's motions for summary judgment. As set forth below, the motions are granted in part and denied in part.

The case law in Colorado makes it clear that plaintiff's injury was compensable under the Workmen's Compensation Act. See State Compensation Insurance Fund v. Walter, 143 Colo. 549(1960)(en banc); Woodruff World Travel, Inc. v. Industrial Commission, 38 Colo.App.92, 554 P.2d 705(1976), cert. denied, __ Colo. __(1974); Deterts v. Times Publishing Company, 38 Colo. App. 48, 552 P.2d 1033(1976),

cert.denied, [Colo. (1976); Campbell v. Gates Rubber Company, Colo.App., 526 P.2d 679(1974); Sieck v. Trueblood, 29 Colo.App. 432, 485 P.2d 134(1971); and Kitchens v. Department of Labor and Employment, 29 Colo.App. 374, 486 P.2d 474(1971). Accordingly, plaintiff's exclusive remedy against defendant Rockwell International is pursuant to workmen's compensation.

Plaintiff has complained that defendant Rockwell International took certain courses of action to preclude plaintiff from an election of a judicial remedy and to reduce its own liability. In the situation here, where an employer has complied with the Workmen's Compensation Act, there is simply no election, since, as stated above, the workmen's compensation remedy is exclusive. See C.R.S., §8-42-102(1973); State Compensation Fund v. Foulds, 167 Colo. 123, 128-29(1968); Varsity Company v. Butters, 155 Colo. 330, 335-37(1964).

There is no dispute that defendant Gary D. Nuss was acting in the scope of his employment at the time of the accident. While the workmen's compensation

preserves judicial remedies against third parties not in the same employ as the complaining employee, see C.R.S., §8-52-108(1973), the statute is a bar to a suit by an employee against a co-employee for injuries sustained when both were acting within the scope and course of their employment. See Sieck v. Trueblood, supra, 485 P.2d at 135; Nelson v. Harding, 29 Colo. App. 76, 480 P.2d 851(1970), cert. denied, __Colo.__, (1971).

The claim against the United States is more problematic. The Federal Tort Claims Act is both a limited waiver of sovereign immunity and a grant of jurisdiction. See 28 U.S.C. §1346 and 2671. The latter section makes it clear that the United States is not vicariously liable for the torts of its independent contractors. See United States v. Orleans, 425 U.S. 807(1976); Logue v. United States, 412 U.S. 521(1973). The issue becomes whether this court has jurisdiction over the claims asserted against the United States. Whether Rockwell International is an independent contractor, or the Rocky Flats facility is a federal establishment or instrumentality are questions of

material fact that cannot be resolved here by way of summary judgment. I note that Judge Matsch has recently described the operations at Rocky Flats in United States v. State of Colorado, 460 F.Supp. 1184 (D.Colo. 1978).

While jurisdiction cannot be assumed, I think it is fair in the present situation to point out that even should this court have jurisdiction, the applicable law would give the United States the same immunity under the workmen's compensation that it gives to other "statutory employers." See C.R.S. §8-48-101(1973); Edwards v. Price, 191 Colo. 46(1976); Scanlon v. United States, Civil Action No. 78-F-509 (D.Colo. June 21, 1979). See generally Richardson v. United States, 577 F.2d 133(10th Cir., 1978); Roelofs v. United States, 501 F.2d 87(5th Cir. 1974). While I express no view on the jurisdictional question itself, the parties' decision on whether to pursue that question may be better informed in light of the above. Accordingly,

IT IS ORDERED that defendants' motions for summary judgment as to defendants Rockwell Interna-

tional and Gary D. Nuss be and hereby are granted, each party to bear his or its own costs.

IT IS FURTHER ORDERED that defendants' motion for summary judgment as to defendant United States be and hereby is denied.

DATED at Denver, Colorado this 3d day of March, 1980.

JOHN L. KANE, JR.
U.S.District Judge

STATUTES:

40 U.S.C. 290

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliance with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: *Provided, however*, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: *Provided further*, That nothing in this section shall be construed to modify or amend the United States Employees' Compensation Act, as amended

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